

observations. See August 1, 2006 Memorandum and Order ([i]n my twelve years on the bench and twenty-three years as a practicing attorney, I have never seen a dual prosecution brought under these circumstances").

Moreover, the government intentionally ignores the most fundamental undisputed evidence¹ establishing the prima facie case of sham prosecution. The Plymouth County District

¹Although it concedes the essential fact that it was the Plymouth County District Attorney Office's decision to refer the case to federal prosecution, the government, apparently recognizing the unpleasant implications of the proceedings in state court, disputes the statement of defendant's state court lawyer setting forth the contemporaneous statements of a state court prosecutor. Gov't Motion at 3-4, n. 3, 14-15, n. 5. It is noteworthy that the recounted conversation is eerily similar to the government's repeated recitation in its Petite waiver letter that federal prosecution was warranted because the plea and sentencing in state court resulted from "a series of miscommunications within the [Plymouth County] District Attorney's Office." Exhibit 14 to Gov't Motion at 1, 5. Notwithstanding this, the government has declined to submit - by affidavit or otherwise - any actual evidence disputing the substance of the conversation. Instead, the government disingenuously notes that the AUSA who initially prosecuted the case, Marianne Hinkle, was a long-time Assistant U.S. Attorney - an assertion defendant does not dispute. Had the government elected to participate in the evidentiary hearing, however, defendant was prepared to call as witnesses (in addition to the defense attorney) at least one Assistant U.S. Attorney who had knowledge of defendant's case as an Assistant District Attorney and who shortly thereafter moved to the United States Attorney's Office.

In any event, this appears to be exactly the kind of factual dispute that can and should be resolved by the evidentiary hearing ordered by the Court.

Attorney's Office, having agreed to a disposition that induced a plea and sentence ending the case in state district court, reconsidered its decision and referred the case for prosecution because it was barred by double jeopardy. In doing so, it engaged in precisely the kind of end run around the double jeopardy clause the Supreme Court and the First Circuit have warned against. Bartkus v. Illinois, 359 U.S. 121, 123 (1959) (duality of sovereigns destroyed where one sovereign attempts to use the judicial machinery of the other to bring a prosecution that is sham or cover for a second prosecution it cannot bring on its own); United States v. Coker, 433 F.3d 39, 46 (1st Cir. 2005) (Bartkus exception to dual sovereignty doctrine designed to prevent "end runs" around otherwise constitutionally protected rights).

This crucial factual distinction renders the cases cited by the government inapposite. This is not a case where a nearly independent federal investigation led to the second prosecution or where independent prosecutors evaluated screening factors differently. See United States v. Guzman, 85 F.3d 823, 828 (1st Cir. 1996) (single DEA agent's sole involvement in foreign prosecution consisted of tipping off Dutch authorities who conducted search and prosecution); United States v. Berry, 164 F.3d 844, 845-46 (state and federal prosecutors evaluated referral factors separately, unaware that each was doing so).

Nor is it a case where state and federal authorities pursued separate investigations and prosecutions for a short time before state authorities dropped their charges in favor of federal prosecution. Coker, 433 F.3d 46. Instead, this is a case where all proceedings had been concluded by an agreement between defendant and the Plymouth County District Attorney's office before state authorities changed their minds and enlisted the aid of the federal government in doing what it was constitutionally prohibited from doing. Bartkus, 359 U.S. at 123.

Similarly, the government's assertion that it has an interest in prosecuting defendant and therefore successive prosecution is justified is a non sequitur. The issue is not whether the government has the ability and interest to prosecute gun crimes federally - clearly it does - but whether in this particular case its interest is so compelling as to override the judicial system's sensitivity to the fairness of successive prosecutions. See Rinaldi v. United States, 434 U.S. 22, 28 (1977) (relying on government's promise to exercise self-restraint and to avoid abuse of dual prosecution tool to limit prosecutions to where there is "compelling" federal interest). This sensitivity is particularly keen in a successive prosecution after state court plea context, where parties routinely enter into agreements with the expectation that the case will be finished once and for all. Cf. United States v. Angleton, 314

F.3d 767 (5th Cir. 2002) (Bartkus exception does not apply to successive prosecution after unsuccessful state court trial prosecution); United States v. Leathers, 354 F.3d 955, 959 (8th Cir. 2004) (same); United States v. Trammell, 133 F.3d 1343, 1349-51 (10th Cir. 1998) (same); United States v. Tirrell, 120 F.3d 670, 677 (7th Cir. 1997) (same). Considered in this light, the government's protracted discussion of defendant's criminal history (a history largely bereft of serious violence or gun charges) adds nothing to the determination of whether its interest here was so compelling as to override what had been the settled expectations of the parties in the state court proceedings.

In sum, it is undisputed that the government has taken an unprecedented step in successively prosecuting Handy after the conclusion of a plea and sentencing process that was joined into by the Plymouth County District Attorney's office. It is also undisputed that it did so not because of any joint investigation or task force but because the Plymouth County District Attorney's office wished to change its mind about a constitutionally binding decision it had made. If the Bartkus exception exists at all (as the First Circuit has repeatedly held it does, see Guzman, 85 F.3d at 827, Coker, 433 F.3d at 46), it is difficult to imagine a set of undisputed facts that more starkly present the destruction of duality between two sovereigns than the instant case.

The government has simply failed to describe adequately why defendant is so different from the thousands of other state court defendants who daily make agreements with local district attorneys' offices in the expectation that their cases will end once and for all that this extraordinary and unique treatment is compelled. The evidentiary hearing ordered by the Court is consequently not only legitimate but necessary in order for the government to continue this prosecution. The Court should therefore decline the government's request to reconsider the Court's August 18, 2006 Order.

CONCLUSION

The Court should deny the government's request for reconsideration. Because the Court has determined that defendant has met his prima facie burden showing collusion, the government should be required to demonstrate its compelling federal interest in prosecuting Handy. It has not, and, according to its Motion, will not. Gov't Motion at 18. Defendant therefore respectfully moves that the case be dismissed.

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CERTIFICATE OF SERVICE

I, Timothy G. Watkins, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on October 3, 2006.

/s/ Timothy G. Watkins
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